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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KEITH ZAVALA,

Plaintiff,

v.

CHRIS CHRONES, et al.,

Defendants.

CASE NO. 1:09-CV-01352-LJO-DLB PC

ORDER DENYING PLAINTIFF’S MOTION
TO COMPEL

(DOC. 65)

Plaintiff Keith Zavala (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s amended complaint, filed May 24, 2010, against Defendants Chris Chrones, S. Kays, D. Smith, C. Martin, and Soto. Pending before the Court is Plaintiff’s amended motion to compel, filed May 23, 2011.¹ Doc. 65. Defendants filed their opposition on June 9, 2011. Doc. 66. Plaintiff filed his reply on June 22, 2011. Doc. 67. The matter is submitted pursuant to Local Rule 230(1).

I. Production Of Documents

In responding to discovery requests, Defendants must produce documents which are in their “possession, custody or control.” Fed. R. Civ. P. 34(a). Actual possession, custody or control is not required, however. “A party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has

¹ Plaintiff had previously filed a motion to compel on February 18, 2011. Doc. 50. The Court denied that motion without prejudice, finding that Plaintiff failed to explain his dispute with Defendants’ responses to his request for production of documents.

1 control over the entity who is in possession of the document.” *Soto v. City of Concord*, 162
2 F.R.D. 603, 620 (N.D. Cal. 1995).

3 Plaintiff contends that Defendants have more documents in their possession, custody, or
4 control than were produced. Plaintiff moves for the production of the following documents:

- 5 1. All written statements, originals or copies, identifiable as reports about the incident on
6 September 15, 2007, on and of Facility B Kern Valley State Prison, made by prison and
7 civilian employees of the Department of Corrections and prisoner witnesses, and other
8 departments or outside agencies.
- 9 2. List of all prisoners housed in A.S.U. #1 and A.S.U. B1 from July 15, 2007 through
10 January 1, 2008.
- 11 3. List of all employees working on Facility B, including A.S.U. #1 (South) and A.S.U. B1,
12 at the time of the incident of September 15, 2007, and three months prior.

13 Pl.’s Mot. Compel 1-6, Doc. 65. Plaintiff has now submitted his arguments as to why
14 Defendants’ responses were deficient.

15 **A. Request For Production No. 1**

16 Plaintiff contends that Defendants or Defendants’ counsel has control of additional
17 documents. Mot. Compel 2:11-27. Plaintiff contends, for example, that Defendant Soto
18 informed him of 1) an internal memorandum regarding Plaintiff’s safety concerns, and 2)
19 communications with the California Inspector General’s office about Defendant Martin. *Id.* at
20 3:18-4:1. Plaintiff further contends that Defendants should produce documents in support of
21 their answers, which deny many of Plaintiff’s allegations regarding the September 15, 2007
22 incident. *Id.* at 4:3-16.

23 Defendants contend that they have discovered Rules Violation Reports (“RVR”) and
24 related documents for inmates Prescott and Reyes, who apparently were involved in the attack on
25 Plaintiff at issue. Defs.’ Opp’n 3:8-18. Defendants contend that any other documents related to
26 the incident are in the control of the Kern County district attorney’s office, Kern County Superior
27 Court, or Kern County grand jury, and that Plaintiff should obtain such documents through
28 subpoena. *Id.*

1 Plaintiff contends that he has not received the RVR for inmate Reyes. Pl.'s Reply 2.
2 Plaintiff also contends that there are interdepartmental communications, including internal affairs
3 investigations and confidential reports generated after the alleged incident. *Id.*

4 Defendants' counsel declares that he has turned over all documents in CDCR's
5 possession or control regarding the attack on Plaintiff. The Court finds that Defendants'
6 additional responses to Plaintiff's discovery requests are sufficient. The Court reminds
7 Defendants that they are under a continuing obligation to turn over any additional documents that
8 they later discover which are responsive to Plaintiff's request. Fed. R. Civ. P. 37(c). For
9 example, if the memorandum concerning Plaintiff's safety concerns and communications with
10 the Inspector General's office concerning Defendant Martin, as mentioned in Plaintiff's motion
11 to compel, are in Defendants' possession, custody, or control, Defendants and their counsel have
12 an obligation to supplement their responses.

13 Plaintiff also contends that Defendants have documents that support their alleged
14 argument that Plaintiff caused his own injury. Pl.'s Mot. Compel 4:3-16. Defendants' answer
15 merely denies Plaintiff's allegations in paragraphs 12 through 15 of the second amended
16 complaint. Defs.' Answer, Doc. 27; Doc. 59. There is no indication in the record that any
17 particular document or other evidence supporting their answer exists. If such documents do
18 exist, are in the possession, custody, or control of Defendants, and are responsive to Plaintiff's
19 discovery requests, Defendants are required to supplement their response.

20 Accordingly, Plaintiff's motion to compel further responses to Plaintiff's request for
21 production of documents No. 1 is denied.

22 **B. Requests Nos. 2 and 3**

23 Plaintiff contends that a list of all prisoners housed in ASU (administrative segregation
24 unit)No. 1 and B1, from July 1, 2007 through January 1, 2008, is necessary for Plaintiff's action,
25 as there may be relevant witnesses to statements made by Defendant Martin that formed the basis
26 of the alleged assault on Plaintiff. Pl.'s Mot. Compel 4:21-5:5. Plaintiff contends that a list of
27 employees working on facility B, including ASU No. 1 and ASU B1, from September 15, 2007
28 to three months prior, is necessary to determine what staff were aware of the attack that would

1 happen to Plaintiff. *Id.* at 5:11-25.

2 Defendants contend that Plaintiff has the list of names of relevant witnesses, as seen on
3 the RVRs provided to Plaintiff regarding the incident at issue. Defs.' Opp'n 3:19-4:5.

4 Defendants contend that to produce the lists over a period of three to six months would become
5 attenuated and overly burdensome. *Id.* Defendants contend that Plaintiff's requests amount to a
6 fishing expedition. *Id.* Plaintiff contends that this expedition is necessary because of the nature
7 of the suit. Pl.'s Reply 3.

8 Though the Court is aware of the nature of Plaintiff's claims, Plaintiff's requests are
9 unduly burdensome and not reasonably calculated to lead to the production of admissible
10 evidence. Defendants' counsel attests that in communicating with CDCR, he learned that to
11 create such a list would be extremely burdensome and time-consuming because of the time
12 period, movement of inmates, and three shifts of employees. Defs.' Opp'n, Richard B. Price
13 Decl. ¶ 6. Defendants' counsel attests that a list would have to be created to respond to a court
14 order compelling further response. *Id.* The Federal Rules of Civil Procedure governing the
15 production of documents does not govern the creation of documents that are not currently in
16 existence, electronically stored or otherwise.

17 Plaintiff is not left without means of discovering the identities of potential witnesses
18 relevant to this action. Plaintiff, for example, is aware of at least one inmate witness, and has
19 been or will be provided RVRs which contain information as to other potential witnesses,
20 inmates or prison staff. Plaintiff's requests for production of documents Nos. 2 and 3, however,
21 are overly burdensome.

22 **II. Conclusion And Order**

23 Based on the foregoing, it is HEREBY ORDERED that Plaintiff's motion to compel,
24 filed May 23, 2011, is denied.

25 IT IS SO ORDERED.

26 **Dated: September 20, 2011**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE